IN THE

Supreme Court of the United States

October Term 1944.

No. 1033

THE ROLAND ELECTRICAL COMPANY, *Petitioner,*

vs.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, DEPARTMENT OF LABOR, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT TO REVIEW A JUDGMENT WHICH REVERSED A JUDGMENT OF THE DISTRICT COURT FOR THE DISTRICT OF MARYLAND AT BALTIMORE AND BRIEF IN SUPPORT THEREOF.

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AUTHORITIES.

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PETITION OF THE ROLAND ELECTRICAL COMPANY FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT TO REVIEW A JUDGMENT WHICH REVERSED THE JUDGMENT OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND AT BALTIMORE.

The Roland Electrical Company, a corporation organized and existing under the laws of the State of Maryland and having its principal place of business at 418 East Pratt Street, in the City of Baltimore, Maryland, files this as its petition praying that a Writ of Certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit entered in this case on January 3, 1945, (R. 105), reversing a judgment entered by the District Court of the United States for the District of Maryland at Baltimore denying an injunction to the respondent as Administrator of the Wage and Hour Division, Department of Labor in a suit brought against the petitioner under Section 17 of the Fair Labor Standards Act, 52 Stat. 1069, Title 29, Section 217 U. S. Code. (R. 24).

OPINIONS BELOW.

The opinion dated February 3, 1944, by the District Court of the United States for the District of Maryland is in the record (pp. 24-33) and is reported as *L. Metcalfe Walling, Administrator of the Wage and Hour Division, Department of Labor,* v. *The Roland Electrical Company,* 54 Fed. Supp. 733. The opinion dated January 3, 1945, by the United States Circuit Court of Appeals is not yet reported, but a copy thereof is contained in the record (R. 98, 104) and has been reprinted as Exhibit "A" to the brief in support of this petition. (*Infra,* 29-35).

JURISDICTION.

The jurisdiction of this Court is invoked under its Rule 38 (5)(b) and Section 240 (a) of the Judicial Code (Title 28, Sec. 347, U. S. Code).

QUESTIONS PRESENTED.

The Circuit Court of Appeals for the Fourth Circuit stated in its opinion (R. 98) that the questions presented by the case are:

(1) Whether the employees of petitioner—which operates a repair shop for the repair and reconditioning of electrical motors for its customers, with incidental sale of new and used motors to some of its customers from time to time—are engaged in the production of goods for commerce within the terms of Section 3(j) of the Fair Labor Standards Act (Title 29, Section 203(j), U. S. Code)?;

(2) And/or whether the petitioner is a "retail or service establishment the greater part of whose selling or servicing is in intrastate commerce" in Maryland within the terms of Section 13(a)(2) of the said Fair Labor Standards Act (Title 29, Section 213(a)(2), U. S. Code)?

The petitioner concedes that these two questions are presented by the record but says that further questions are also presented thereby, namely:

(3) Whether the used electrical motors repaired by petitioner for its customers were not then in the possession of the ultimate consumers and had been removed from the stream of commerce at the time the petitioner was requested by its intrastate customers to, and did, repair the same?

(4) Whether the electrical facilities in the Maryland plants and establishments of the petitioner's customers which the petitioner's employees sometimes repaired in such plants and establishments likewise had been removed from the stream of commerce, had become fixtures of the real estate, and thereby in the hands of the ultimate consumers of such electrical facilities?

(5) Whether the electrical motors and other electrical facilities repaired by petitioner's employees for petitioner's intrastate customers and which such customers used to operate machines and other appliances for the production of goods for commerce were not too remotely connected with the production of goods for commerce to justify the conclusion that petitioner's employees were engaged in the production of goods for commerce?

FEDERAL STATUTE INVOLVED.

The Federal Statute involved is the Fair Labor Standards Act of June 25, 1938, Ch. 676 (52 Stats. at Large, 1060, et seq.) and particularly that part thereof as follows:

Title 29, Sec. 203(b), U. S. Code—

> "'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof."

Title 29, Sec. 203(j), U. S. Code—

> "'Produced' means produced, manufactured, mined, handled, or in any manner worked on in any State; and for the purpose of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any

process or occupation necessary to the production thereof in any state."

Title 29, Section 213(a)(2)

"The provisions of sections 206 and 207 of this title shall not apply with respect to * * * (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce. * * *"

STATEMENT OF FACTS.

The basic and essential facts in this case were stipulated by the parties, the stipulation filed on February 2, 1944, in the trial court, and are not in dispute. A copy of that stipulation is in the record (R. 6, 14), a copy thereof was printed in the appendix of the Administrator's brief in the Circuit Court and for the convenience of this Court it has been reprinted as Exhibit "C" to the brief in support of this petition. (*Infra*, 48-49) Some testimony was taken by both parties in the trial court but in general the evidence so taken is cumulative and explanatory of the stipulated facts. Each of the parties printed in the Appendices to their briefs extracts from such testimony and copies of such printed Appendices have been filed with this petition and brief.

(a)

Character of Petitioner's Place of Business.

The character, or equipment of petitioner's place of business has been set forth in Paragraph V of the aforestated stipulation (R. 8), as follows:

"The defendant occupies the front part of the first floor of 418 West (East) Pratt Street, Baltimore, Maryland, for business office, drafting space for draughtsman, and shop for repair of small electric motors, electric toasters, electric irons, and similar appliances. In the rear of the first floor is the shop where all large motors, compensators, switches, etc., are repaired or rebuilt; the oven for baking repaired

and rebuilt motors; lathes, pulleys, and other equipment essential to the operation of the shop. All electrical supplies and materials sold over the counter or used in connection with repair work are stored on the first floor. The rear of the second floor is used for the storage of old and new equipment and sundry fabrication of carbon brushes. Electrical motors and equipment prior to sale of same are stored in defendant's warehouse at 1418 Belvidere Street. Defendant owns this warehouse, but rents the building at 418 West (East) Pratt Street.

"For the purpose of rebuilding, repairing and reconditioning motors for its various customers, the defendant is employing the following machinery: three lathes, one drill press and one shaper, with their respective tools, cutters and other attachments; vises, saws, emery wheels, a hydraulic press, two electric hoists and four chain falls and other tools and machinery generally used in establishments of this kind."

It will be noted that this stipulated description of the petitioner's shop shows no machinery, tools, etc., for the manufacture of new electric motors or appliances, but rather for repair, reconditioning and rebuilding of old and used electrical equipment for petitioner's customers. It is this machinery for which petitioner holds from the City of Baltimore, under an Ordinance 462, approved March 6, 1919, a certificate of exemption from taxation as stated in paragraph XIV of the stipulation. (R. 13).

(b)

Volume and Description of Work Performed in Petitioner's Business.

It was stipulated in paragraph VI (R. 9, 10) as representative of petitioner's "present volume and character of business" that the breakdown of petitioner's business for the period of January 1, 1942, to October 31, 1942, showed an aggregate gross income of $251,833.35, as follows:

Breakdown of sales for the period Jan. 1, 1942 to Oct. 31, 1942—Total sales

[Transcribed from distribution ledgers which firm uses for cost-accounting purposes]

[Read down]

Shop or "A" sales	Wiring or "B" sales	Material or store charge sales	Cash sales	Rentals	Total sales	Total sales transcribed from general ledger (read across) general ledger classifications	Percent of sale
$69.98	$87,406.88	$7,371.24			$94,487.10		
68,016.41		9,450.02			77,466.43	Wiring sales (including labor and materials costs)	37.5
1,546.38	1,473.00	66,627.52	$3,137.86		72,784.76	Shop sales (includes labor and material costs on repair of motors)	30.7
			4,980.06		4,980.06	Motor sales (includes sale price of motors both new and used)	28.9
				$1,755.00	1,755.00	Merchandise sales (cash sales only of materials and cash motor repairs)	1.97
						Rentals (of motors and other electrical equipment)	.7
69,632.77	88,878.88	83,448.78	8,117.92	1,755.00	251,833.35	Totals.	
27.42	35.2927	33.1365	3.22	.696	100	Percent.	

The designations "Shop or 'A' Sales", "Wiring or 'B' Sales" and "Material or Storage Charge Sales", as used in the above tabulation showing gross business of $251,833.35 for the period January 1, 1942, to October 31, 1942, are defined in paragraph VI of the stipulation. It is stated therein that "Shop or 'A' sales" represented all income obtained from customers as the result of repairs and reconditioning of motors on and off of the premises of the customer and included both the labor and material costs of such repairs. The "Wiring or 'B' sales" represented all income from customers for the repair and installation of wire, fittings, and relocation and rearrangement of electrical motors, etc., in the plants of such customers. The "Material or storage charge sales" represented receipts from the sale of new and used motors, generators, etc.

There was an additional income of $500 resulting from sales by petitioner of scrap incidental to the repair and reconditioning work in its shop. (R. 11)

The new motors and other equipment sold by the petitioner were not manufactured by the petitioner but equipment it had purchased from manufacturers thereof for resale in the petitioner's retail trade.

It was stipulated in Paragraph IX of the stipulation (R. 11) that as of November 1, 1942, the petitioner had approximately 1,000 active accounts, 99 per cent of which were those of commercial or industrial firms. It is further stipulated in paragraph VII that during the period of June 30, 1941, to October 31, 1941, the petitioner performed work in Maryland plants for but eleven customers whose principal offices were in other states and that during that entire year the petitioner sold but six rebuilt and repaired motors for an aggregate of $1,020.00 to customers in other states than Maryland. (R. 11) The parties apparently used the figures for 1941 in this respect either because the figures for the above period of January 1, 1942, to October 31, 1942, were not available or the stated figures for 1941 were representative of the volume of petitioner's business of an interstate

character, an infinitesimal part of the aggregate business!

Among the 99 per cent of the commercial or industrial firms which were customers of the petitioner, 33 of them furnished $55,013.20 of the total of $251,833.35 business done by petitioner for the period from January 1, 1942, to October 31, 1942, and of the 33, four were engaged in the State of Maryland in repair of ships, tugs, barges and other boats intended for movement in interstate commerce; and 28 were engaged in the production of other goods than electric motors and other appliances for commerce, as set forth in paragraphs X and XI of the stipulation. (R. 11-13).

The record does not show that the other 967 accounts producing the balance of $196,820.15 of the aggregate income of $251,833.35 were producing goods for commerce, though it is indicated in paragraph IX of the stipulation that they were almost entirely commercial and industrial concerns. (R. 11) In view of the care with which it was stipulated in paragraph XI that almost all of those 33 concerns were producing goods for commerce, it must be presumed upon the basis of *expressio unis est exclusio alterius*, that none of the other 967 concerns were doing so.

Some of these customers of the petitioner had electrical maintenance departments, but for some reason or another, not fully disclosed by the record, the petitioner was called upon to do some of their repair work. (R. 68, 69).

(c)

Number of Petitioner's Employees and Description of Their Duties.

This electrical repair shop employs thirty-six persons, including one foreman, eight mechanics, six helpers and four trouble shooters in the shop departments, six mechanics and five helpers in the wiring department, and six office employees: Eliminating the six office employes, this shop is manned by thirty men, eleven of whom are helpers. (R. 7, 8).

They manufacture nothing for commerce, either intrastate or interstate, unless it be a few parts for use in

repairing, rebuilding and/or reconditioning electric motors or some other electrical appliance for customers. (R. 17, 71-95). The men in the shop work on disassembling, cleaning, rewiring, and/or rebuilding electrical motors and other electrical appliances belonging to customers of the petitioner. In a few instances it may be assumed that they rebuild or recondition electrical motors which the petitioner purchased from, or took in trade from, some of its customers.

The trouble shooters divide their time between work in the shop on the repair, etc., of electrical appliances, and work in the plants and business establishments of petitioner's customers where an electrical motor or appliance gets out of working condition and the trouble is such that it may be corrected without disconnecting the motor and taking it to petitioner's shop for repairs. These trouble shooters also do a certain amount of rewiring and relocating electrical motors in the shops of petitioner's customers—all located in Baltimore. When a motor has to be removed to petitioner's shop for repairs, a motor, the property of petitioner, is usually loaned or rented to the customer for use during the repair period. These loaned or rented motors are installed and connected in the customers' plants and establishments by the petitioner's trouble shooters. It is stated in the stipulation (Par. XII) that approximately 400 motors of customers were in petitioner's shop for repairs as of November 1, 1943. (R. 13).

There is nothing in the stipulation or in the record to the effect that any of petitioner's thirty-six employees operate machines when installed in the plants and other establishments of the customers of the petitioner in the manufacture of anything for commerce. By repairing and installing the electrical motor or other appliance owned by the customer, or even a used or new motor sold by the petitioner to its customer, such a motor becomes a fixture and is removed from the stream of commerce, as effectively as was the sack of cement converted into concrete and used in the construction of the building in which such motor is housed. (R. 71-95).

There is likewise nothing in the record to show, or even suggest, that the customers of the petitioner are engaged in manufacturing and repairing electrical motors for commerce. On the contrary, the showing is to the effect that some 32, only, of the 1,000 firms and individuals having accounts with the petitioner as of November 1, 1942, manufacture or otherwise produce other goods for commerce. While some part of the other 968 firms and individuals are stated to be commercial or industrial firms, it is not stated that they or any of them produced goods for interstate commerce and that fact cannot be assumed. On the contrary, having regard for the industrial and commercial community of Baltimore—of which the Court may take judicial notice—it is to be assumed that these other 968 industrial and commercial concerns are retail stores, hotels, shops, and the like.

The status of petitioner's employees as to the production of goods by petitioner's customers for commerce is not unlike that of an employee operating a shop to grind axes to be used by woodsmen in cutting trees which are afterwards sawed into lumber and the lumber placed in the stream of commerce.

As to motors sold by the petitioner, its status is that of a retail dealer and as to used motors and other appliances repaired by petitioner for its customers to be used in their plants and business establishments, the status of petitioner remains that of both a retailer and a service establishment. The status of the customers owning both the used motors and the new motors is that of the ultimate consumer.

SPECIFICATIONS OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

1. In reversing the District Court of the United States for the District of Maryland at Baltimore which gave judgment for the petitioner here and in giving judgment for the respondent here.

2. In holding that the petitioner's employees were engaged in the production of goods for commerce within the terms of the Fair Labor Standards Act (Title 29, Section 203 (j), U. S. Code), instead of affirming the holding of the District Court that the petitioner's employees were not engaged in the production of goods for commerce.

3. In holding that the petitioner was not within the exemption from the Fair Labor Standards Act (Title 29, Section 213(a)(2), U. S. Code), as being a "retail or service establishment the greater part of whose selling or servicing is in intrastate commerce."

4. In failing to hold that the used motors and other electrical appliances, property of petitioner's customers, repaired, reconditioned, and/or rebuilt by petitioner for such customers, as well as the new and used motors sold by petitioner to its customers, almost wholly intrastate, were not goods in the hands of the ultimate consumers and thereby wholly removed from the stream of interstate comemrce.

5. In failing to hold that repairing, reconditioning, and/or rebuilding of electrical motors and other appliances used by others as a tool in producing some part or all of some other type or class of goods for commerce was too remote from the production of such goods for commerce to come within the terms of the Fair Labor Standards Act.

6. In holding that petitioner was not a retail and service establishment because goods were produced for commerce by some 32 of its 1,000 customers for all of whom the petitioner performed repair, reconditioning, and/or rebuilding services on their electrical appliances or sold to some of them at retail new and/or used electrical motors which were used by such customers as a tool in the production of goods for commerce.

REASONS FOR GRANTING WRIT.

1. The judgment entered January 3, 1945, by the Court of Appeals for the Fourth Circuit in this case is contrary to the judgments of the following other United States Circuit Courts of Appeals, namely:

No. 78 decided January 9, 1945, by the Second Circuit in *Phillips, Administratrix, et al.* v. *Star Overall Dry Cleaning Laundry Company, Inc., and All Service Laundry Corporation.* The opinion in said case has not been reported as yet but a copy thereof is printed as Exhibit "B" to the brief in support of this petition.

White Motor Company v. *Littleton,* (C. C. A., 5th), 124 Fed. (2nd) 92.

Lonas v. *National Linen Service Corporation,* (C. C. A. 6th), 136 Fed. (2nd) 433, 150 A. L. R., 697, Certiorari denied, 320 U. S. 785. To the same effect, *Hunt* v. *National Linen Service,* 178 Tenn. 262.

Martino v. *Michigan Window Cleaning Company* (C. C. A., 6th), 145 Fed. (2nd) 163.

2. The judgment of the Circuit Court of Appeals in this case is contrary to the judgments of this Court in the following cases:

McLeod v. *Threlkeld,* 319 U. S. 491, 502.

Western Union Telegraph Company v. *Lenroot,* No. 49, decided January 8, 1945, where the telegraph messages were no more "produced" by the telegraph company employees than the goods in commerce in this case were "produced" by petitioner's employees because they worked on electrical appliances used by others to assist in producing such goods.

Higgins v. *Carr Brothers Company,* 317 U. S. 574.

Schechter Poultry Corporation v. *United States,* 295 U. S. 495.

A. B. Kirschbaum Company v. *Walling,* 319 U. S. 517.

3. Finally, the Circuit Court of Appeals erred because its judgment in this case is contrary to the stipulated facts that petitioner's employees worked on electric motors and other appliances which had ceased to be a part of the stream of commerce and had come into the possession of the ultimate consumers, the customers of the petitioner, and such

appliances, in the instance of 32 concerns, were but tools used by such customers, and not by petitioner's employees, in producing goods for commerce. Hence the petitioner's employees were not within the terms of Sections 6 and 7 of the Fair Labor Standards Act, Title 29, Sections 206 and 207 U. S. Code, and were within the exceptions from said Act contained in Title 29, Section 213(a)(2), U. S. Code.

Respectfully submitted,

O. R. McGUIRE,
Attorney for Petitioner.

March 8, 1945.

IN THE

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vs.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, DEPARTMENT OF LABOR, *Respondent*.

BRIEF IN SUPPORT OF THE PETITION.

THE FACTS.

The material and essential facts in this matter have been stipulated, the stipulation is in the record and the stipulated facts have been summarized in the foregoing petition under the subheads: (a) Character of petitioner's place of business; (b) Volume and description of work performed in petitioner's business; and (c) Number of petitioner's employees and description of their work.

These facts will not be repeated herein except to the extent necessary to point up the argument as to why the petition should be granted and the judgment by the Circuit Court of the United States for the Fourth Circuit should be reviewed and reversed in order to prevent confusion in the administration of the Act.

ARGUMENT.

I.

Conflict Among the Circuits and With This Court as to What Constitutes Production of Goods for Commerce Within the Terms of the Fair Labor Standards Act.

There exists a decided conflict among judgments of the Circuit Court of Appeals and with judgments of

this Court as to what constitutes the production of goods for commerce within the terms of the Fair Labor Standards Act, which conflict has not been, but which should be resolved by this Court.

Conflict among Circuit Courts of Appeal.

The Circuit Court of Appeals for the Fourth Circuit held in this case to the effect that the petitioner's employees were engaged in the production of goods for commerce while the Circuit Court of Appeals for the Second, and Sixth Circuits have held in similar cases that the employees were not engaged in the production of goods for commerce. This conflict will be hereinafter more fully stated.

It seems that the difficulty has arisen by reason of the opinion and judgment of this Court in *Kirschbaum* v. *Walling*, 316 U. S. 517, 527, where the Court went to the limit in holding that employees were within the terms of the Fair Labor Standards Act because they were employees of an owner of a loft building which was rented to other companies wherein they produced goods for commerce but the court there said, among other things, that—

> "Selling space in a loft building is not the equivalent of selling services to consumers, and, in any event, the 'greater part' of the 'servicing' done by the petitioners here is not in intrastate commerce."

The Court further said in that case that—

> "Our problem is, of course, one of drawing lines. But it is not at all a problem in mensuration. There are no fixed point, though lines are to be drawn. The real question is how the lines are to be drawn—what are the relevant considerations in placing the line here rather than there."

The *Kirschbaum case* can be, and should be, distinguished from petitioner's case—even as was necessarily done by the United States Circuit Court of Appeals for the Second Circuit in the case of *Phillips, administratix et al* v. *All*

Service Laundry Corporation, et al, No. 78, decided January 9, 1945, a copy of which opinion is printed as Exhibit "B" to this brief. (*Infra*, 36-41). Also, a similar distinction was necessarily made by the opinion and judgment of this Court dated January 8, 1945, in *Western Union Telegraph Company* v. *Lenroot*, No. 49 and in this Court's prior opinion and judgment in *McLeod* v. *Threkeld*, 319 U. S. 491, 502.

The United States Circuit Court of Appeals for the Second Circuit in the case of *Phillips, Administratix, et al*, had before it a case where the Star Overall Dry Cleaning Laundry Company, Inc., of New York, collected laundry from customers, some of such laundry being collected in other States, and delivered the same to the All Service Laundry Corporation to be cleaned and pressed, being in this respect similar to the poultrymen in *Schechter Poultry Corporation* v. *United States*, 319 U. S. 491 and the fruit dealer in *Higgins* v. *Carr Brothers Company*, 317 U. S. 572. See also the conflict with the Sixth Circuit Court of Appeals herein set forth on pages 26-27.

The Star Overall Dry Cleaning Company, Inc., then collected the laundry from the All Service Laundry Corporation and delivered the same to the customers. The suit was by employees of the All Service Laundry Corporation under the Fair Labor Standards Act. The United States District Court gave judgment for the employees and this judgment was reversed by the Circuit Court of Appeals for the Second Circuit.

The court assumed for the purpose of the case that the laundry of the garments was "production" but did not determine whether the Company doing the cleaning was a service company. The court placed its opinion on the broader ground that the garments had come into the hands of ultimate consumers before such garments were delivered to the laundry and that the employees of the laundry in cleaning the garments were not engaged in the production of goods for commerce, the garments having been removed from the stream of commerce by being placed in the hands

of their ultimate consumers before they came into the possession of the laundry.

That court said in reference to Title 29, Section 203(j) of the United States Code that:

> "What are to be treated as goods within the Act is there defined, and it is made plain that the definition does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than the producer, manufacturer, or processor thereof."
>
> "The statute makes a clear distinction between goods which are being worked upon in one or more of the ways embraced within the statutory definition of 'produced' before they get into the actual physical possession of the ultimate consumer and after they have gone into such possession, provided the ultimate consumer is not himself a producer, manufacturer or processor. We think it is also clear that the ultimate consumers are the persons who wear out these garments and incidentally get them dirty while doing so. Congress did not attempt to regulate hours and wages to the full extent of its power to do so."

Here the petitioner's customers were the ultimate consumers of the electrical applicances owned by them which petitioner's employees repaired in its shop, or which they repaired in the shops of the customers. (R. 23, 69, 71-95). Such customers were also the ultimate consumers of the second-hand or new electrical appliances which said customers purchased at retail from petitioner's shop. These motors and other electrical appliances were not being worked upon or produced by petitioner's employees for commerce; they had been effectively removed from all commerce before they were worked on and repaired by petitioner's employees.

Conflict with Judgments of this Court.

This Court had before it in *Western Union Telegraph Company* v. *Lenroot*, decided January 8, 1945, basically a similar question in denying the attempt of the respondent to hold that the telegraph company had violated the Fair

Labor Standards Act by the employment of minor children to collect and deliver telegraph messages. After an exhaustive review of the legislative history of the Fair Labor Standards Act, the Court concluded that the telegraph messengers, in collecting and delivering the telegrams, did not "Produce" any goods in commerce and that in fact the telegrams themselves never entered commerce, but only the electric impulses which ticked out the messages written by others on the telegrams. The Court there said:

> "The Government contends that in defining 'produced' the statute intends 'handled' or 'worked on' to mean not only handling or working or in relation to producing or making an article ready to enter interstate transit, but also includes the handling or working on which accomplishes the interstate transit or movement in commerce itself. If this construction is adopted, every transporter, transmitter, or mover in interstate commerce is a 'producer' of any goods he carries. But the statute while defining 'produced' to mean 'handled' or 'worked on' has not defined 'handled' or 'worked on.' These are terms of ordinary speech and mean what they mean in ordinary intercourse in this context. They serve a useful purpose when read to relate to all steps, whether manufacture or not, which lead to readiness for putting goods into the stream of commerce. One who packages a product, or bottles a liquid, or labels, or performs any number of tasks incidental to preparing for shipment might otherwise escape the Act, for in a sense he neither manufactures, produces, or mines the goods. We are clear that 'handled' or 'worked on' includes every kind of incidental operations preparatory to putting goods into the stream of commerce."

It seems clear that the repair, reconditioning, or rebuilding of electrical motors or other electrical appliances by petitioner's employees for use of employees of petitioner's customers in producing, handling or working on goods to be placed into the stream of commerce is not on the part of petitioner's employees the "production," "handling"

or "working on" the products which were later placed in the stream of commerce—any more than was the collection and delivery of telegraph messages the "production," "handling" or "working on" such messages for commerce. The electrical appliances repaired, reconditioned, and/or rebuilt by petitioner's employees no more entered commerce than did the messages in the *Western Union Telegraph Company* case.

While in the instances of some 32 of petitioner's approximately 1,000 customers the electrical appliances repaired by petitioner's employees were probably used to some extent in some of the processes of preparing other goods for the stream of commerce, yet such 32 customers were not "producers, manufacturers or processors" of motors and other electrical appliances worked on by petitioner's employees—the word "thereof" in Title 29, Section 203 (j) U. S. Code obviously having reference to the goods which went into commerce and not the consumer goods, such as electrical appliances used by the employees of such customers in producing such other goods "preparatory to putting goods into the stream of commerce."

This point seems to have been controlling in the opinion and judgment of this Court in *McLeod* v. *Threlkeld*, 319 U. S. 491, where the cook sought to be brought under the terms of the Fair Labor Standards Act prepared food for employees who were under the Act as maintenance-of-way employees of a railroad company. The Court there admitted that food was necessary for the employees engaged in commerce but said:

> "It is not important whether the employer, in this case the contractor, is engaged in interstate commerce. It is the work of the employee which is decisive. Here the employee supplies the personal needs of the maintenance-of-way men.
>
> "Food is consumed apart from their work. The furnishing of the board seems to us as remote from commerce, in this instance, as in the cases where employees

supply themselves. In one instance the food would be as necessary for the continuance of their labor as the other.

"We agree with the conclusions of the District Court and the Circuit Court of Appeals that this employee is not engaged in commerce under the Fair Labor Standards Act."

The stipulation of facts clearly establish that petitioner operates an electrical repair shop, serving all customers seeking its service and that all but a very small part of its business is wholly intrastate in character—most of it being for customers in the City of Baltimore. It certainly cannot be held that by such local and intrastate sales and services the petitioner is engaged in commerce within the terms of the Fair Labor Standards Act.

And we do not so read the opinion of the Circuit Court of Appeals. That opinion holds that petitioner's employees come within the terms of the Fair Labor Standards Act because the motors which they repaired and the wiring which they performed in the petitioner's shop or in the plants of petitioner's customers were used by some 32 of such customers to produce goods for commerce, and that 99 per cent of the balance of 968 customers were commercial and industrial concerns and not private parties. Otherwise the court below does not attempt to determine why such use by the small number of 32 should require the other 968 customers of the petitioner to pay the increased costs necessitated by petitioner's compliance with the Fair Labor Standards Act.

Yet in addition to the facts that the electrical appliances owned by petitioner's customers on which petitioner's employee's worked had been removed from the stream of commerce and were in the possession and use of the ultimate consumers, as were the garments in the above cited *Phillips, administratrix, et al case*, the work on the motors and other electrical appliances were as remote from the goods produced by the 32 customers of petitioner which

went into the stream of commerce as was the food eaten by the rights-of-way men in *McLeod* v. *Threlkeld*. Further such electrical appliances no more went into commerce than did the physical telegrams in the *Western Union Telegraph Company* case.

It is clearly apparent from the latter case and the *Kirschbaum* case that the work performed must have a *direct relation* to the goods actually produced for commerce and not some remote relationship such as repairing an electrical motor which may or may not be used for the performance of some part of a production process and even if used, must be used by others after having been supplied with electrical power or impulses generated by some third party. This Court has pointed out both in the *Kirschbaum* and *Western Union Telegraph Company* cases that the Fair Labor Standards Act is not as broad as the National Labor Relations Act and that simply "affecting" interstate commerce is not sufficient to make out a case under the Fair Labor Standards Act. This Court said in *Higgins* v. *Carr Brothers Company* on this point that:

> "In that connection it is argued that respondent is in competition with wholesalers doing an interstate business and that it can by underselling affect those businesses and their interstate activities. As we indicated in *Walling* v. *Jacksonville Paper Company* that argument would be relevant if this Act had followed the pattern of other federal legislation such as the National Labor Relations Act and extended federal control to business "affecting" commerce. But as we pointed out in *A. B. Kirschbaum Co.* v. *Walling*, 316 U. S. 517, this act did not go so far but was more narrowly confined."

This quotation from the opinion is a sufficient answer to the suggestion contained in the opinion below of the Circuit Court of Appeals that if the repair work performed by petitioner's employees had been performed by the employees of the customers of petitioner producing goods for commerce, such employees of petitioner's customers would surely have been under the Fair Labor Standards Act, and

hence petitioner's employees were, too. The cooks on the dining cars of the railway company for which the cook prepared the meals in *McLeod* v. *Threlkeld* were doubtless in commerce to the same extent as the right-of-way-men. Also in the *Kirschbaum* case this Court pointed out that the Fair Labor Standards Act did not go to the extent of covering employees whose services merely *affected* interstate commerce.

Further, if the plant employees of petitioner's customers who might have repaired the electrical appliances were covered by the Fair Labor Standards Act—and as to that we express no opinion—their additional wages could be added as a part of the price of the goods produced by their employer for commerce and passed on to the ultimate consumer, whereas here there is a point beyond which petitioner's prices for repairs, etc., of electrical appliances cannot go with any hope of securing such work from these plants having maintenance electrical employees. (R. 71-95). It is this and other conditions which led Congress not to go as far in the Fair Labor Standards Act as it did in the National Labor Relations Act. We think the following language of the Court in the *Kirschbaum* case is an apt reply to the court below, namely:

> "If the work of the employee has only the most tenuous relation to, and is not in any fitting sense 'necessary' to, the production, it is immaterial that their activities would be substantially the same if the employees worked directly for the producers of goods for commerce."

This should surely be true where but 32 out of a total of a 1,000 customers are the only ones shown by the record to have been engaged in producing goods for commerce, and even that showing has not been clearly made.

An intrastate customer may be both the ultimate consumer of capital goods—such as the electrical motors and wiring in this case in the instance of 33 of petitioner's customers—and also a manufacturer or producer of other goods for commerce.

II.

The Petitioner's Business Is a Retail and Service Establishment the Greater Part of Whose Selling and Servicing Is in Intrastate Commerce.

While it is stipulated that the petitioner held an exemption from city taxation for certain of its machinery, this exemption was under a 1918-19 city ordinance which is printed as appendix "B" to the appellant's brief in the court below, (R. 34-35). This exemption extended, among other things, to "mechanical tools, or implements, whether worked by hand or steam or other motive power, machinery." Petitioner's dies, lathes, etc., used in its repair shop clearly fall within this description and nowhere in the stipulation or other evidence in the record is there any suggestion that petitioner operates a manufacturing plant. All of the evidence is to the effect that petitioner operates a repair shop and makes some sales therein at retail of new and used motors and incidental electrical supplies.

The court below brushed aside, without comment, any suggestion that the petitioner was a manufacturer of electrical equipment for interstate commerce and, as above stated, grounded its opinion on the point that petitioner's employees worked on electrical equipment used by 32 customers engaged in manufacturing goods for commerce and that 99 per cent of the balance of petitioner's 1,000 customers were "commercial and industrial concerns." The 33 concerns produced but $51,013.20 of the petitioner's gross aggregate income of $251,833.35 for the period and certainly the sum of 33 and $51,013.20 are not the "greater part" of 1,000 and $251,833.35, respectively. (R. 10, 12).

Out of the gross return of $251,833.35 on all of the business of petitioner for the stated period, but $77,784.76 resulted from sales of new and used motors and $4,980.06 resulted from cash sales of material and motor parts. (R.

10). The latter two items are not the "greater part" of the gross aggregate income from "service" and also they show that the petitioner is in fact a retail establishment in addition to being a servicing establishment.

The stipulated facts further show that for a typical period the sales to customers of other states than Maryland aggregated but $1,020.00 and the testimony of Mr. Stozenbach, president of petitioner, is undisputed that during the entire year of 1941 but six sales were made to residents of other states than Maryland and that three of such sales were over the counter in petitioner's shop in Baltimore, with the purchasers hauling the purchases away with them. (R. 65-67). It is thus self-evident that the "greater part" of petitioner's sales and services were wholly intrastate and even intercity.

The Fair Labor Standards Act (Title 29, Section 213 (a)(2) specifically provides that its terms shall not apply with respect to:

> "(2) Any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce."

If there was ever an establishment which met this statutory test, it is that of the petitioner. It is as plain as a pikestaff that the petitioner is wholly engaged in a retail sale and servicing business and that this business is almost wholly intrastate.

Even if petitioner does have as its customers some 32 or 33 concerns engaged in "producing" goods for commerce, with 967 or 968 others not doing so, the sales and service to such 32 or 33 are intrastate transactions to the same degree as are intrastate the sales and intrastate servicing to the balance of the 1,000 customers. There is nothing in the plain language of the statute which would nullify this exemption, or exception by the mere sale at retail or servicing of a concern which produces other goods, different from those produced by petitioner, in commerce,

or which is a commercial or industrial concern. The repair of an electrical appliance or rewiring of a factory to the extent of rearranging an electrical motor does not constitute the production of other goods in the customer's plant for commerce.

The Circuit Court of Appeals below had previously adopted in *Guess* v. *Montague*, 140 Fed. (2nd) 500, and it applied here the terms of a regulation (R. 47-53) which had been rejected as not in conformity with law by the Circuit Court of Appeals for the Sixth Circuit in *Lonas* v. *National Linen Service Corporation*, 136 Fed. (2nd) 433, 15 A. L. R. 697, certiorari denied, 320 U. S. 785. The court there said:

> "The Administrator, basing his argument upon Interpretative Bulletin No. 6 issued December 1938 and revised June 1941 by the Wage and Hour Division of the Department of Labor, contends that the exemptions in Sec. 13(a)(2) are limited to establishments retail in character whether they sell goods or services. This view is based upon what he conceives to be drawn from legislative history of the Act and the grammatical construction of the exemption section. Since the related terms are coupled in the same sentence and are used in the disjunctive with the terms 'retail' and 'service' both modifying the word 'establishment', they refer to employers who deal directly with private consumers as distinguished from commercial and industrial customers. In other words, the service establishment exemption extends only to those establishments having the characteristics of retail stores, and the defendant's business is not a retail service establishment because 60% of its customers are industrial or business concerns.
>
> "We find no support for this interpretation in the language of the exemption section. Two enterprises are therein exempted, one a retail establishment and the other a service establishment, the exemption of each subject to the condition that in the case of the retail establishment the greater part of its selling must be intrastate commerce, and in the case of a service

establishment the greater part of its servicing must be intrastate commerce. Had the Congress intended to limit the exemption of service establishments to those which perform services for private individuals as distinguished from business enterprises, it would have had little difficulty in clearly expressing such purpose."

In fact, the whole of the English language was available to the Congress from which to select words to express any such purpose as the Administrator and the Circuit Court of Appeals below have read into this exemption. Under the stipulated facts and the principles of the case of *Lonas* v. *National Linen Service Corporation* it matters nothing that 32 of petitioner's named customers produced goods for commerce and that 99 per cent of the balance of its 968 customers were "commercial and industrial concerns," that is, not private parties. Moreover, as hereinbefore shown, the petitioner's customers were the ultimate consumers of the electrical motors and other electrical appliances on which the petitioner's employees worked in a degree no whit different in principle from the situation where a farmer purchases a farm wagon for use in producing crops or a groceryman purchases a truck for use in hauling groceries to his intrastate customers!

In failing to follow the above quoted principles stated by the Circuit Court of Appeals for the Sixth Circuit in the *Lonas case*, and in failing to give effect to the stipulated facts, the court below fell into error in reversing the trial court—thereby perpetuating the error which it had committed in the prior case of *Guess* v. *Montague*.

CONCLUSION.

Both because the opinion and judgment of the Circuit Court of Appeals below is in conflict with the judgments of the Supreme Court of the United States and with judgments of other United States Circuit Court of Appeals and because the opinion and judgment of said Circuit Court of Appeals for the Fourth Circuit reversing the judgment of

the District Court for Maryland are clearly in error as a matter of statutory construction, the petition for certiorari should be granted and the conflict resolved in the interests of thousands of other similar retail and service establishments engaged in intrastate business.

Respectfully submitted,

O. R. McGUIRE,
Attorney for Petitioner.

Exhibit "A".

UNITED STATES CIRCUIT COURT OF APPEALS
FOURTH CIRCUIT

No. 5266.

L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor,
Appellant,
versus
THE ROLAND ELECTRICAL COMPANY,
Appellee.

Appeal from the District Court of the United States for the District of Maryland, at Baltimore.

(Argued November 14, 1944. Decided January 3, 1945.)
George M. Szabad, Attorney, U. S. Department of Labor,

(Douglas B. Maggs, Solicitor; Bessie Margolin, Assistant Solicitor; Lemuel H. Davis, Regional Attorney, and Joseph I. Nachman, Attorney, U. S. Department of Labor, on brief) for Appellant, and Raphael Walter (Nyburg, Goldman & Walter on brief) for Appellee.

PARKER, Circuit Judge:

This is an appeal from an order denying an injunction to the Administrator of the Wage and Hour Division in a suit brought against the Roland Electrical Company under section 17 of the Fair Labor Standards Act, 52 Stat. 1069, 28 USCA 217. There are two questions in the case: (1) whether the company's employees are engaged in the production of goods for commerce within the meaning of section 3(j) of the Act, 29 USCA 203(j); and (2) whether the company

is a "retail or service establishment the greater part of whose selling or servicing is in intrastate commerce", within the meaning of sec. 13(a)(2) of the Act, 29 USCA 213(a)(2). The District Judge while intimating doubt on the first of these questions answered the second in the affirmative and denied the injunction on that ground. 54 F. Supp. 733.

The pertinent facts are succinctly set forth by the Administrator in his brief in a statement which the company, referred to there as appellee, accepts in its brief as correct. That statement is as follows:

"Virtually all of the relevant facts have been stipulated. Appellee holds itself out as being engaged in the business of commercial and industrial wiring, electrical contracting, and dealing in electrical motors and generators, for private, commercial, and industrial uses. It holds a certificate of exemption as a manufacturer, pursuant to a Baltimore ordinance which exempts from taxation all personal property used entirely or primarily for the purposes of manufacturing.

"Appellee's principal activities fall roughly into three classes: (1) Repair, reconditioning, and rebuilding of electric motors, which accounted for 27.42 percent of appellee's gross income during the first ten months of 1942; (2) installation, relocation, extension, and repair of electrical wiring systems which accounted for 35.29 percent of its income; and (3) sale of new and used electric motors which accounted for 33.13 percent of its income.

"The motor repair and reconditioning work is performed either on appellee's premises, consisting of a two-story building, or on the premises of the customer for whom the work is done. All of the wiring is, of course, performed on the premises of the customer. To carry on its work, appellee employs a foreman, fourteen mechanics, eleven helpers, four trouble shooters, and six office employees.

"Appellee works on motors and wiring, and sells motors, for private, commercial, and industrial uses. Ninety-nine percent of its customers, however, are commercial or industrial firms. Thirty-two of these firms accounted, during the period covered by the stipulation, for 38 percent of appellee's motor repair work, 19 percent of its wiring work and 12 percent of its motor sales. Every mechanic employed by appellee worked in practically every workweek for some of these firms."

We think that there can be no question but that defendant's employees were engaged in the production of goods for commerce within the meaning of the act. As shown by the preceding statement, the greater part of its business consisted in the repair, rebuilding and reconditioning of motors and in the installation, relocation, extension and repair of electrical wiring used in the production of goods for interstate commerce. An employee is deemed to be engaged in the production of goods for commerce within the meaning of the act if he is engaged "in any process or occupation necessary to the production thereof." 29 USCA 213(j); and the repair of motors and wiring for use in the production of goods for commerce was certainly a "process or occupation necessary to the production thereof". See *Holland* v. *Amoskeag Mfg. Co.*, 44 F. Supp. 884, 887. There is nothing in the argument that the service is not to be deemed within the meaning of the Act because it might have been obtained from a number of independent contractors. It was no less necessary because it might have been furnished by a number of persons who did not in fact furnish it. The question is whether it constituted a part of the integrated effort by which the goods were produced. *Armour & Co.* v. *Wantock* ____ U. S. ____ (decided Dec. 4, 1944.) As said in the case cited:

"The argument would give an unwarranted rigidity to the application of the word 'necessary,' which has always been recognized as a word to be harmonized with its context. See *McCulloch* v. *Maryland*, 4 Wheat. 316, 413, 414. No hard and fast rule will tell us what can be dispensed with in 'the production of goods.' All depends upon the detail with which the bare phrase is clothed. In the law of infants' liability, what are 'necessaries' may well vary with the environment to which the infant is exposed; climate and station in life and many other factors. So, too, no hard and fast rule may be transposed from one industry to another to say what is necessary in 'the production of goods.' What is practically necessary to it will depend on its environment and position."

No one would contend, we think, that employees who did for the customers of the company what its employees did here would not have been engaged in the production of goods for commerce if they had been employed by the customers; but the fact that they were employed by an inde-

pendent contractor makes no difference, since the application of the act depends not upon the nature of the employer's business but upon the character of the employees' activity. *Kirschbaum* v. *Walling*, 316 U. S. 517; *Warren-Bradshaw Drilling Co.* v. *Hall*, 317 U. S. 88; *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564; *Overstreet* v. *North Shore Corp.*, 318 U. S. 125; *McLeod* v. *Threlkeld*, 319 U. S. 491. We went into this subject quite fully in *Bracey* v. *Luray*, 4 Cir. 138 F. 2d 8, 11-12; and we need not repeat what was said there. See also *Davis* v. *Goodman*, 4 Cir. 133 F. 2d 52, holding an employer subject to the provisions of the act where all that his employees did was perform labor which enabled another manufacturer to turn out a product which entered into interstate commerce.

And we think it equally clear that the company does not fall within the exemption of 13(a)(2) of the act, 29 USCA 213(a)(2), which provides that the minimum wage and maximum hour provisions shall not apply to "any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce". Even if the company could be held to be a service establishment within the meaning of this exemption, the greater part of its servicing was not in intrastate commerce, and the exemption did not apply to it for that reason. *Fleming* v. *Arsenal Bldg. Corp.*, 2 Cir. 125 F. 2d 278, aff. *Kirschbaum* v. *Walling*, 316 U. S. 517. As said by Judge Learned Hand, speaking for the Circuit Court of Appeals of the Second Circuit in the case cited:

"Nor do we think that the defendant is a 'service establishment the greater part of whose * * * servicing is in intrastate commerce'; sec. 13(a) (2). * * * If it is a 'service establishment', at least its exemption must depend upon the extent to which its servicing is intrastate. Suppose for example, that these manufacturers, instead of pressing the clothes themselves, sent them out to other shops which pressed only for them; the fact that the pressing took place in the same state as the cutting and stitching would not, we think, exempt the pressers; their servicing would be in interstate commerce'. The 'servicing' being a part of the 'production', the test should be what kind of production is a part of it. The question is really the same as that we have just considered; i.e., whether it is important how that production is divided among employers. It cannot be that if the exemption extends beyond retail 'servicing', it is the

character of the 'servicing' itself that counts, divorced from the 'production' of which it is a part. Again, we should be met by the anomaly arising from such an interpretation—the capricious incidence of the act resulting from the accident of the industrial division of the whole process."

In *Kirschbaum* v. *Walling*, 316 U. S. 517, the Supreme Court not only affirmed the decision below but dealt with this particular point in the same way. The court said:

"A final objection to the decisions below need not detain us long. The petitioners' buildings cannot be regarded as 'service establishments' within the exemption of sec. 13(a)(2). Selling space in a loft building is not the equivalent of selling services to consumers, and, in any event, the 'greater part' of the 'servicing' done by the petitioners here is not in intrastate commerce. The suggestion that the Act, if applied to these employees, goes beyond the bounds of the commerce power is without merit."

See also *McLeod* v. *Threlkeld*, 319 U. S. 491, 494, note 6; *Hanson* v. *Lagerstrom*, 8 Cir. 133 F. 2d 120; *Consolidated Timber Co.* v. *Womack*, 9 Cir. 132 F. 2d 101; *Walling* v. *New Orleans Private Patrol Service*, 57 F. Supp. 143; *Lorenzetti* v. *American Trust Co.*, 45 F. Supp. 128, 139.

And we do not think that the company can be held a retail or service establishment within the meaning of the act. The labor of its employees was performed almost altogether in rendering service to commercial and industrial concerns, where the cost of the service would not be absorbed by the one to whom they were rendered but would be passed on as a part of the price of the product. The whole policy of the act is to bring employees rendering this sort of service under its provisions. Thus in sec. 3(i), 29 USCA 203(i), goods, whose production for commerce subjects employees to the provisions of the act, are defined in the broadest terms and are then said not to include "goods after their delivery into the actual physical possession of the ultimate consumer thereof *other than a producer, manufacturer, or processor thereof.*" (Italics supplied). This throws light upon the sense in which the words "retail and service establishment" are used and indicates very clearly that they have application to establishments furnishing goods or services to the ultimate consumer, who

does not expect to pass the cost on to others as a producer, manufacturer or processor. As we said in *Guess* v. *Montague*, 4 Cir. 140 F. 2d 500, 503:

"In *Bracey* v. *Luray*, 4 Cir. 138 F. 2d 8, this day decided, we hold that a retail establishment within the meaning of the exemption is one which sells in small quantities to the ultimate consumer. In the principle *noscitur a sociis*, the 'service' establishment contemplated by the exemption must be of the same sort as the 'retail' establishment therein referred to, i.e., it must be one 'selling services to consumers', and this is the clear intimation of the Supreme Court. *A. B. Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 526, 62 S. Ct. 1116, 1121, 86 L. Ed. 1638. As suggested by the Circuit Court of Appeals of the Second Circuit in *Fleming V. Arsenal Building Corporation*, 2 Cir. 125 F. 2d 278, 280, we think that the exemption 'should be limited to those who serve consumers directly, like tailors, or garages, or laundries'. Other illustrations of service establishments within the meaning of the statute have been given as 'barber ships, beauty parlors, shoe-shining parlors, clothes pressing clubs, laundries, automobile repair shops, or the like.' *Wood* v. *Central Sand & Gravel Co.*, D.C. 33 F. Supp. 40, 47; *Fleming* v. *A. B. Kirschbaum Co.*, 3 Cir. 124 F. 2d 567, 572."

In *Bracey* v. *Luray*, *supra*, we pointed out that the exemption was not contained in the act as originally drafted but was inserted to make clear that the act would not apply to those dealing with the ultimate consumer. We said:

"The exemption was not contained in the bill as originally introduced into Congress. S. 2475, H.R. 7200, 75th Cong., 1st Sess. May 24, 1937. It was added by an amendment, the purpose of which was to make clear that the act would have no application to 'retail dry goods, retail butchering, grocers, retail clothing stores, department stores', located near and making occasional sales across state lines. 83 Cong. Rec. 7437-7438. *Walling* v. *American Stores Co.*, 3 Cir. 133 F. 2d 840, 843."

The services rendered to producers of goods for interstate commerce in the installation and repair of wiring and the repair, servicing and reconditioning of motors are suf-

ficient without more to bring the employees of the company under the act. As to the rest, its business consisted in the sale of new motors and the reconditioning and sale of second hand motors. This business was clearly not that of a retail or service establishment within the meaning of the act. *Super-Cole Southwest Co.* v. *McBride*, 5 Cir. 124 F. 2d 90; *Guess* v. *Montague, supra.*

The case is not distinguishable in principle, although there are a few minor factual differences, from that which was before us in *Guess* v. *Montague, supra.* What we have is not what anyone would think of as a retail or service establishment, like a grocery store or a barber shop, but an electrical machinery repair shop, which was engaged in manufacturing to the extent that it rebuilt or reconditioned electrical machinery. A large part of the services rendered by its employees were on the premises of its customers, and practically all of these were in furtherance of the production of goods for commerce and were of a sort which, if rendered by the employees of the customers, would unquestionably have brought them under the act. The sales which it made were not ordinary retail sales to consumers, but sales of machinery to be used for purposes of production. It is not clear that, if the work done by an employee is in interstate commerce or in the production of goods for interstate commerce, section 13(a)(2) can ever have application. See note 6 to *McLeod* v. *Threlkeld, supra.* Certainly it can have no application to a case such as this.

We have not overlooked the decision in *Lonas* v. *National Linen Service Corp.*, 6 Cir. 136 F. 2d 433, and *Martino* v. *Michigan Window Cleaning Co.*, 6 Cir. 145 F. 2d 163; but, if these decisions are accepted as sound law, we think they are clearly distinguishable from the case at bar in that the services here were more clearly in furtherance of the production of goods for commerce and the establishment is more clearly not a retail or service establishment within the meaning of the act. Cf. *McLeod* v. *Threlkeld, supra.* The drawing of the line between what does and what does not fall under the act is not always an easy matter. The cases have been collected and classified in the note to 150 A.L.R. at p. 700 *et seq.* There can be no question, we think, but that the clear weight of authority as mirrored by these cases supports our conclusion that the company here is subject to the act.

Reversed.

Exhibit "B".

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 78—October Term, 1944.

(Argued November 1, 1944 Decided January 9, 1945.)

LILLIAN MAUD PHILLIPS, as Administratix of the goods, chattels and credits of CLIFFORD R. PHILLIPS, deceased, JOSEPH BONURA, TONY ZUMMO, TONY SALADINO, CHARLES SALADINO, PHILLIP PERRI, ALBERT JETT, DANNY FANTO, THELMA DOUGLAS, ADA BERKELEY, individually and on behalf of all other employees of defendant similarly situated,

Plaintiffs-Appellees-Appellants,

—against—

STAR OVERALL DRY CLEANING LAUNDRY COMPANY, INC.,

Defendant,

and

ALL SERVICE LAUNDRY CORPORATION,

Defendant-Appellant-Appellee.

Before:

L. HAND, CHASE *and* CLARK,

Circuit Judges.

Appeal by the plaintiffs and by one of the defendants from a judgment of the District Court for the Southern District of New York. Reversed and complaint dismissed.

BARNEY ROSENSTEIN, for Plaintiffs-Appellees-Appellants; Charles R. Katz of Counsel, Sidney S. Wolchok, on the brief.

SAMUEL PFLUG, for Defendant-Appellant-Appellee, Levy, Kornblum & Katz and Joseph Katz, of Counsel.

POSNER AND FOX, for National Industrial Launderers and Cleaners Assn., *Amicus Curiae.*

CECIL SIMS, for American Institute of Laundering, *Amicus Curiae*, Bass, Berry & Sims, of Counsel.

This suit was brought by the plaintiffs, as employees, Lillian Maud Phillips, Administratix, having been duly

substituted for her deceased husband who was originally a party, to recover for themselves and for others similarly situated overtime compensation and liquidated damages pursuant to the provisions of §16(b) of the Fair Labor Standards Act, 29 U. S. C. A. §201. It was at first only against Star Overall Dry Cleaning Laundry Company, Inc., but when the trial of the action was begun All Service Laundry Corporation for whom these employees worked as pressers and manglers was, by stipulation, made a party defendant.

The facts were stipulated and may be summarized as follows:

The defendant corporations have their principal places of business in Brooklyn, N. Y., where Star Overall Dry Cleaning Laundry Company, Inc., hereinafter to be called Star, was doing the period covered by the complaint engaged in the business of collecting soiled linens, overalls, slacks, coats, pants, union suits and hoovers and of having them laundered or otherwise cleaned. It then returned them to its customers and was paid a fee for the service. Many, perhaps all, of these garments were rented by Star to its customers but some may have been owned by the customers themselves. The record is not clear as to that and in our view it is immatedial because all the garments, whether owned and rented by Star or owned by its customers, had been delivered to the ultimate consumer before they were collected by Star and worked upon by the plaintiffs. During the time involved in this suit 95% of Star's business was done with customers within the State of New York and 5% with people outside that state. Its business was done with individuals to the extent of 82% and 18% was "bulk", a term meaning that the soiled clothes were received in larger bundles than those collected from individuals. The bulk collections were from many kinds of industrial, business and professional establishments. Star did not manufacture any of the garments.

Substantially all of the cleaning, laundering and pressing of these garments was done for Star by All Service Laundry Corporation, hereinafter to be called All Service, which operated a laundry whose business was entirely with customers within the State of New York. Its work for Star amounted to 80% of all its business.

The defendants moved to dismiss the complaint on the ground that the plantiffs were not engaged in commerce or in the production of goods for commerce within the meaning

of the Fair Labor Standards Act and on the further ground that the defendants were service establishments, the greater part of whose business was in intrastate commerce, which were exempt from the provisions of the Act under §13(a)(2). The motion of Star was granted and the complaint was dismissed as to it without costs. Judgment was entered against All Service in favor of each plaintiff for stipulated amounts without interest and for a reasonable attorney's fee, the amount of which was stipulated. The plaintiffs and All Service appealed.

CHASE, *Circuit Judge*:

As Star was not the employer of the plaintiffs, it is clear that the complaint should have been dismissed as to it and no one now disputes that. It should be noted at the outset that the plaintiffs were not engaged in interstate commerce simply because they performed part of the work involved in washing or otherwise cleaning and making ready for delivery to Star garments which Star later returned to its interstate customers as and when it saw fit to do so. Whether an employee is engaged in interstate commerce for the purposes of the Fair Labor Standards Act depends not upon "whether the employee's activities affect or indirectly relate to interstate commerce but upon whether they are actually in or so closely related to the movement of the commerce as to be a part of it. Employee activities outside of this movement, so far as they are covered by wage-hour regulation, are governed by the phrase, 'production of goods for commerce.'" *McLeod* v. *Threlkeld*, 319 U. S. 491.

Nor do we think the plaintiffs were engaged in the production of goods for commerce. Not because their work was not "production" within the meaning of §3(j), for we shall assume arguendo that the trial judge was right in holding that it was, but because those garments were not "goods" within the statute because excluded therefrom by the provisions of §3(i) of the Act. What are to be treated as goods within the Act is there defined, and it is made plain that the definition "does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than the producer, manufacturer, or processor thereof."

There is no claim and no proof that All Service was engaged in the production of goods for interstate commerce except as it washed or otherwise cleaned garments collected by Star and delivered to it. Indeed, the stipulation con-

clusively shows that its other business was all intrastate. Nor is there any claim or evidence that any of the garments which Star collected and delivered to All Service for cleaning had not previously been delivered into the actual physical possession of the ultimate consumer. On the contrary it is apparent that they were dirty, used garments when collected by Star and that what All Service did was to restore their cleanliness after they had been used by the customers of Star, the ultimate consumers from whose actual physical possession the garments had been taken. Cases relied on by the plaintiff like *Enterprise Box Co.* v. *Fleming*, 125 F. (2) 897; *Hamlet Ice Co.* v. *Fleming*, 127 F. (2) 165; and *Chapman* v. *Home Ice Co.*, 136 F. (2) 353, are to be distinguished because the "goods" had not been delivered into the "actual physical possession of an ultimate consumer who was not also a producer, manufacturer or processor."

The statute makes a clear distinction between goods which are being worked upon in one or more of the ways embraced within the statutory definition of "produced" before they get into the actual physical possession of the ultimate consumer and after they have gone into such possession, provided the ultimate consumer is not himself a producer, manufacturer or processor. We think it also clear that the ultimate consumers are the persons who wear out these garments and incidentally get them dirty while doing so. Congress did not attempt to regulate hours and wages to the full extent of its power so to do. *Kirschbaum Co.* v. *Walling*, 316 U. S. 517; *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564. The express limitations Congress put into the statute must be given effect even though it is a remedial statute to be given a liberal construction. As this completely disposes of the appeal we find it unnecessary to determine whether All Service was a service establishment exempt from the Act by virtue of §13(a)(2).

Judgment reversed and complaint dismissed.

CLARK, *Circuit Judge* (dissenting):

The effect of the opinion is to make a special exception from the Fair Labor Standards Act of all repairing and reconditioning work done on goods owned by another. Difficulties may well develop as to the extent of this exception; thus are factories or stores ultimate consumers as to repairs or reconditioning of their equipment? Passing that, it seems to me this interpretation of the Act must be rejected for several reasons. It makes an exception quite foreign to

any purpose of the Act and more or less in conflict or overlapping with other recognized exceptions whose purpose is clear, particularly the important one, so much discussed in this case heretofore, of retail or service establishments; it finds the basis for such an exception in an unnatural place in the Act (in a definition of goods for commerce of §3(i), 29 U. S. C. A. §203(i), not in the "Exemptions" provision of §13, which contains, inter alia, the exception for service establishments, nor even as a limitation on the very extensive definition of "produced" of §3(j) to include "handling" or "in any other manner working on such goods"); and it gives what seems to me a clearly unintended turn to the words used in the definition relied on.

In general, the definitions employed in this "Definitions" section are designed to carry out the broad coverage shown by the entire Act; witness the definition of goods in this very provision as including a considerable list of things and finally "articles or subjects of commerce of any character, or any part or ingredient thereof," as well as the definition of "produced" already referred to. The obvious purpose of this particular limitation was declaratory, to make sure that the other broad provisions were not, indeed, carried too far; it would not have been necessary but for their extent; and it should take its color from them and its immediate context. On the bare words of the other provisions, goods already in the home, the factory, the store, or the hotel would come within the Act, though they were not so intended. Much of this limitation may be thought already obvious, though a carefully drawn statute would still be so framed as to make these matters express rather than implied; some of the transactions otherwise included, however, would be much less obvious. Thus, the linen used in a hotel, the equipment in a store or factory, while being used on the premises by these respective establishments, would othrwise have fitted the definition. And the construction made reduces to insignificance the words "the actual physical possession of the ultimate consumer" and magnifies the word "after" ("after their delivery"); it would be more natural to hold that, if the goods go out of the consumer's actual physical possession back into the stream of commerce, there must be a redelivery to him to make the provision apply. I would award interest, *Greenberg* v. *Arsenal Bldg. Corp.*, 2 Cir., 144 F. 2d 292, 294, and then affirm on the grounds taken below, D. C. S. D. N. Y., 55 F. Supp. 238.

But even if I am wholly wrong about all this, I still should not want to make so novel—and, for all we know, possibly far-reaching and administratively confusing—interpretation of the Act in quite so offhand a way. There appears nothing in the past history of the Act, or of its enactment, to suggest it; indeed, the contrary is indicated, because the legislators' discussion called to our attention was so directed to the exemption for service establishments, as well as the fact that the answer and the motion to dismiss below were based on that exemption chiefly, with the single other point that the plaintiffs and the goods were not in interstate commerce. That explains why this statutory provision was not mentioned below, 55 F. Supp. 238, and why discussion centered about the meaning and effect of *Lonas* v. *National Linen Service Corp.*, 6 Cir., 136 F. 2d 433, certiorari denied 64 S. Ct. 157, which all seem to have thought was the important decision and which likewise does not mention this statute. It also explains the limited attention paid the provision in the numerous briefs filed before us. The interpretation has no case support; it is opposed to the view taken in *Walling* v. *Armbruster*, D. C. W. D. Ark., 51 F. Supp. 166 (converting sedans into buses for their owners held within the Act), and seemingly in *Slover* v. *Wathen*, 4 Cir., 140 F. 2d 258, 259 (barges being repaired held "goods" within the Act); and it rejects the reasoning of cases such as *Atlantic Co.* v. *Walling*, 5 Cir., 131 F. 2d 518, 521, that the words relied on have "only the effect of placing a time and circumstance limitation on the application of penalties," or *Chapman* v. *Home Ice Co. of Memphis*, 6 Cir., 136 F. 2d 353, 355, certiorari denied *Home Ice Co. of Memphis* v. *Chapman*, 64 S. Ct. 72, and *Hamlet Ice Co.* v. *Fleming*, 4 Cir., 127 F. 2d 165, 170, certiorari denied 317 U. S. 634, that they apply only to goods "withdrawn from further traffic or sale." And a case such as *Enterprise Box Co.* v. *Fleming*, 5 Cir., 125 F. 2d 897, certiorari denied *Enterprise Box Co.* v. *Holland*, 316 U. S. 704, holding not exempt the making of cigar boxes sold locally to cigar manufacturers who used them to house their cigars for shipment and sale, is either directly controlling or else illustrates just the confusion noted earlier as to the meaning of ultimate consumer which must result from this interpretation. At the very least therefore, I think the case should be reheard, after an invitation to the Wage & Hour Administrator to present his views.

Exhibit "C".

Stipulation of Facts

Filed 2nd February 1944

It is hereby stipulated and agreed by and between the parties in the above-styled case, without waiving the right to introduce additional testimony upon the trial of this case as to matters covered herein, as well as all other matters, and, further, without waiving the right to object to the introduction of all or any part of this stipulation as irrelevent or immaterial to issues arising in this case, as follows:

I

Defendant is engaged in the business of buying and selling new and used motors of various types; of repairing, reconditioning, and rebuilding used moters; and of installing and repairing private, commercial, and industrial wiring systems. The detaned character of the business of the firm is as follows:

(1) The relocation and extension of wiring in systems already installed in private, commercial, and industrial establishments.

(2) The repair of private, commercial, and industrial wiring systems.

(3) The installation of wiring in new private, commercial, and industrial establishments.

(4) Instalaltion and relocation of commercial and industrial motors, including the installation of necessary switches, wiring, etc.

(5) Sale of electrical materials and supplies over the counter.

(6) Rental for periods of a month or less of motors, floodlights, compensators, etc., to commercial and industrial firms.

(7) Sale of new and used motors.

(8) Reconditioning, repairing, and rebuilding electric motors and generators in its shop and repairing motor and generators on its customers' premises by removing old and defective brushes, commutators, armatures, stators, wiring, and bearings; and by replacing said parts with new, reworked, and built-in parts.

(9) The fabricating, when necessary, of shafts, brushes, and other motor parts in connection with its reconditioning, repairing, and rebuilding operations.

II

Defendant, as a matter of trade accommodation, occasionally sells motors to various dealers at special dealers' discounts, and the invoices thereof are marked "Dealer's Special Discount, 10%—30 Days, Otherwise Net," and holds itself out to the public as being engaged, and does engage in, commercial and industrial wiring, electrical contracting, and dealing in electrical motors and generators, for private, commercial, and industrial uses.

III

A substantial number of the motors which defendant regularly sold, reconditioned, repaired, rebuilt, and relocated, and a substantial part of the wiring which was installed, relocated, and repaired for various customers of the defendant, as hereinafter listed, were respectively used in the production of goods for interstate commerce. A substantial number of the motors repaired, reconditioned, and rebuilt were small motors, such as those used for electric fans, drink mixers, refrigerators and oil burners. A majority of work in repairing and reconditioning motors in dollar volume was done on motors used for industrial purposes, such purposes being the production of goods for commerce.

IV

In connection with its operations it had, on November 18, 1942, the following types and numbers of employees:

Office Employees		6
Shop Department		19
Foreman	1	
Trouble Shooters	4	
Mechanics	8	
Helpers	6	
Wiring Department		11
Mechanics	6	
Helpers	5	

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Among the duties of persons employed within the designation "Mechanics," in connection with the repair and rebuilding of motors, are:

(a) making bearings,
(b) making and shaping shafts,
(c) making contacts for controllers,
(d) boring out pulleys and couplings,
(e) resurfacing commutators and winding stators and armatures.

V

The physical set-up of the plant is as follows:

Defendant occupies the front part of the first floor of 418 West Pratt Street, Baltimore, Maryland, for business office, drafting space for a draughtsman, and shop for repair of small electric motors, electric toasters, electric irons, and similar appliances. In the rear of the first floor is the shop where all large motors, compensators, switches, etc., are repaired or rebuilt; the oven for baking repaired and rebuilt motors; lathes, pulleys, and other equipment essential to the operation of the shop. All electrical supplies and materials sold over the counter or used in connection with repair work are stored on the first floor. The rear of the second floor is used for the storage of old and new equipment and sundry fabrication of carbon brushes. Electrical motors and equipment prior to sale of same are stored in defendant's warehouse at 1418 Belvedere Street. Defendant owns this warehouse but rents the building at 418 West Pratt Street.

For the purpose of rebuilding, repairing, and reconditioning motors for its various customers, the defendant is employing the following machinery: three lathes, one drill press, and one shaper, with their respective tools, cutters, and other attachments; vises, saws, emery wheels, a hydraulic press, two electric hoists and four chain falls, and other tools and machinery generally used in establishments of this kind.

The business and activities of the defendant are amplified and described in the printed circular of the defendant, which is marked Exhibit A and annexed at the end hereof.

VI

The breakdown of sales of the defendant for the period January 1, 1942, to October 31, 1942, is as hereinafter set forth. Such breakdown is representative of present volume and character of business.

The designation "Shop or A Sales" in said breakdown means all income obtained as a result of the repair and reconditioning of motors worked on in its own shop or on customers' premises, and includes labor and material costs for such repair.

The designation "Wiring or B Sales" comprises income from work done outside of defendant's own shop, and at its respective customers' locations, and comprises the repair and installation of wire, fittings, and relocation and rearrangement of motors, together with incidental equipment.

The designation "Material or Storage Charge Sales" covers receipts from the sale of new and used motors, generators, etc.

Breakdown of sales for the period Jan. 1, 1942 to Oct. 31, 1942—Total sales

[Transcribed from distribution ledgers which firm uses for cost-accounting purposes]

[Read down]

Shop or "A" sales	Wiring or "B" sales	Material or store charge sales	Cash sales	Rentals	Total sales	Total sales transcribed from general ledger (read across) general ledger classifications	Percent of sale
$69.98	$87,405.88	$7,371.24	———	———	$94,487.10		
68,016.41	———	9,450.02	———	———	77,466.43	Wiring sales (including labor and materials costs) ———	37.5
1,546.38	1,473.00	66,627.52	$3,137.86	———	72,784.76	Shop sales (includes labor and material costs on repair of motors) ———	30.7
———	———	———	$4,980.06	———	4,980.06	Motor sales (includes sale price of motors both new and used) ———	28.9
———	———	———	———	$1,755.00	1,755.00	Merchandise sales (cash sales only of materials and cash motor repairs) —	1.97
						Rentals (of motors and other electrical equipment) ———	.7
69,632.77	88,878.88	83,448.78	8,117.92	1,755.00	251,833.35	Totals.	
27.42	39.2927	33.1365	3.22	.696	100	Percent.	

In the course of its activities, defendant accumulates and sells to local junk dealers approximately 12,000 pounds of scrap metal annually at an annual sales value of approximately $500.00, which scrap is ultimately melted down and shipped in interstate commerce. This scrap metal is obtained from junked parts of purchased old motors; from unusable parts; and from borings and filings of reconditioned, repaired, and rebuilt motors resulting from cutting and shaping parts for used motors worked on for defendant and defendant's customers. All the inside mechanics perform work in every work-week, resulting in the accumulation of such junk.

VII

[NOTE: Here fololws a breakdown of figures showing that from June 30, 1941, to October 31, 1941, the defendant performed work in the State of Maryland for eleven customers outside said State, in the total amount of $1,210.15.]

VIII

[NOTE: This paragraph contains a schedule showing that during the calendar year 1941, the defendant made six sales of rebuilt motors to customers outside the State of Maryland, for a total dollar volume of $1,020.00.]

IX

As of November 1, 1942, defendant had approximately 1,000 active accounts as reflected in its Accounts Receivable Ledger, 99 percent of which are commercial or industrial firms, which percentage is applicable to the remainder of said 1,000 active accounts as of said date of November 1, 1942.

X

For the period January 1, 1942, through October 31, 1942, defendant's larger and most active accounts were as follows:

	"A" Shop	"B" Wiring	"Motor"	Total
1. The American Ice Co.	$ 235.47	$ 828.81	$ 28.30	$ 1,092.58
2. Arundel Corp.	20.91	135.32	48.09	204.32
3. Anchor Post Fence Co.	140.00	835.09	429.56	1,404.65
4. Acme Steel Engineering Co.	594.85		149.56	744.41
5. American Smelting & Ref. Co.	2,368.25		266.70	2,634.95
6. Arcrods, Inc.	491.95		3.48	495.41
7. American Brake Shoe & Foundry Co.	274.43			274.43
8. American Cider Vinegar Co.	242.68	536.61	161.46	940.73
9. Bartgis Bros.	1,268.95		643.66	1,912.61
10. Baltimore Paper Box Co.	348.72		413.00	761.72
11. Baltimore Salesbook Co.	522.70	764.22	169.79	1,456.71
12. Baltimore Marine Repair Shops	413.92		40.00	453.92
13. Ches. & Pot. Tel. Co. of Balto.	109.48		34.00	143.48
14. Chesapeake Shoe Mfg. Co.	66.64	158.74	34.00	259.38
15. Commercial Envelope Co.	137.23		91.10	228.33
16. Calvert Distilling Co.	692.00	12.60	91.60	796.20
17. Julien P. Friez & Sons	150.23		510.99	761.22
18. Fertilizer Mfg. Co-op. Inc.	1,962.44	82.17	303.42	2,348.03
19. Guilford Folding Box Co.	551.00	368.28	3.04	922.32
20. General Ship Repair Co.	1,903.54	94.05	719.44	2,717.03
21. Gordon Lavin Paper Box Co.	625.74	1,449.36	112.81	2,187.91
22. Holtite Mfg. Co.	887.65	1,371.34	244.16	2,503.15
23. International Bedding Co.	196.21	522.46	10.00	728.67
24. H. Klaff & Co., Inc.	1,540.62	173.42	1,950.00	3,664.04
25. Jas. J. Lacy Co.	559.94	24.61	77.51	662.06
26. Marine Engine & Boiler Co.	2,555.90		70.21	2,626.11
27. Revere Copper & Brass Co.	737.50		99.10	836.60
28. Standard Metal Refining Co.	400.65		5.75	406.40
29. Maryland Drydock Co.	3,350.21		2,652.67	6,002.88
30. Glenn L. Martin	1,620.79		352.40	1,973.19
31. Melville Woolen Mills	986.13	9,292.99	230.83	10,509.95
32. Proctor and Gamble	452.96		61.60	514.56
33. Frank A. Wight Distilling Co.	387.38	1,296.96	160.91	1,845.25
Totals	26,897.05	17,947.03	10,169.12	55,013.20
Percentage	48.89	32.62	18.48	100

and that the specific breakdown of jobs performed for said customers during said period, was as follows for each of said 33 accounts:

[NOTE: Here follows a breakdown of the transactions referred to in Paragraph X, showing the date, order number, and amount of the charge to each of the thirty-three customers set forth in the foregoing schedule.]

That during said period, January 1, 1942, through October 31, 1942, every mechanic of the defendant worked, in practically every workweek, for some of the said customers either in the repair of their motors, generators, the reconstruction of used motors sold to them, or in performing electrical work at their respective establishments.

XI

That of said list of 33 most active accounts, the following were engaged in the repair of ships, tugs, barges, and other boats which were intended for movement in interstate commerce:

Baltimore Marine Repair Shops.
General Ship Repair Company.
Marine Engine & Boiler Company.
Maryland Drydock Company.

That the Chesapeake and Potomac Telephone Company is engaged in interstate commerce, and that the remaining companies on said list, with the exclusion of the American Ice Company, were engaged in the production of goods for commerce as defined in Section 3 of the Fair Labor Standards Act of 1938, shipping at least a substantial portion of their total production to points outside the State of Maryland.

XII

That as of November 1, 1943, defendant had in its shop approximately 400 motors awaiting reconditioning, repairing, or rebuilding, a substantial number of which were engaged in the production of goods for commerce.

XIII

That the current activities of defendant and its employees are substantially the same as those of the prior periods as hereinbefore described.

XIV

That defendant holds, and is currently operating under, a certificate of exemption from taxation on machinery as a manufacturer from the City of Baltimore under Ordnance 462, approved March 6, 1919.

XV

That in the years 1938 and 1939, defendant failed to comply with Section 6 (a) (1) of the Act; that in the years 1939 and 1941, it failed to comply with Section 6 (a) (2) of the Act; that it has failed to comply with Sections 7 (a) (1) and 7 (a) (2) of the Act and is currently failing to comply with Section 7 (a) (3) of the Act.

XVI

Defendant has not fully complied with the provisions of Section 11 (c) of the Fair Labor Standards Act of 1938 nor complied with the regulations prescribed by the Administrator, issued under the authority of said Section 11 (c).

Dated January 31, 1944.